Simpson Thacher

Securities Law Alert

Year in Review:

- Supreme Court Decisions
- Significant Circuit Court Decisions
- Significant Delaware Chancery Court Decisions

2022

"Recognized for its 'world class lawyering,' Simpson Thacher & Bartlett LLP has a leading litigation practice with wide-ranging capabilities."

– The Legal 500

Supreme Court Decisions

Supreme Court: Duty to Monitor ERISA Plan Investments and Remove Imprudent Ones Is Not Satisfied by Offering Low-Cost Investments as Plan Options

On January 24, 2022, the Supreme Court unanimously vacated the Seventh Circuit's judgment in favor of defendant plan fiduciaries in a lawsuit where ERISA plan participants alleged that defendants violated their duty of prudence by failing to remove imprudent investments from the plans' offerings. *Hughes v. Northwestern*, 142 S.Ct. 737 (2022) (Sotomayor, J.). The Court disagreed with the Seventh Circuit's conclusion that the offering of petitioners' preferred type of low-cost investments as plan options eliminated any concern that other plan options were imprudent. The Court held that "[s]uch a categorical rule is inconsistent with the context-specific inquiry that ERISA requires and fails to take into account respondents' duty to monitor all plan investments and remove any imprudent ones."

The Court explained that petitioners' allegation "must be considered in light of the principles set forth in *Tibble* [*v. Edison International*, 575 U. S. 523 (2015)] to determine whether petitioners have stated a plausible claim for relief." In *Tibble*, the Court considered a plan fiduciary's duty of prudence under ERISA where plaintiffs alleged that the plan fiduciaries had offered higher priced retail-class mutual funds as plan investments when lower priced institutional-class mutual funds were available. The Court in *Tibble* concluded that plaintiffs had identified a potential violation because "a fiduciary is required to conduct a regular review of its investment." The Court further determined that this duty is "continuing" and that "a plaintiff may allege that a fiduciary breached the duty of prudence by failing to properly monitor investments and remove imprudent ones."

In this case, the Court noted that the Seventh Circuit did not apply *Tibble*'s guidance and instead focused on "a fiduciary's obligation to assemble a diverse menu of options." However, the Court found that "[t]he Seventh Circuit erred in relying on the participants' ultimate choice over their investments to excuse allegedly imprudent decisions by respondents." The Court held that fiduciaries could breach their duty if they "fail to remove an imprudent investment from the plan within a reasonable time[.]"

Significant Circuit Court Decisions

First Circuit: Reverses Dismissal of Action Claiming Investors Were Misled About a New—Allegedly Non-Functional—Product

On December 22, 2021, the First Circuit reversed the dismissal of a securities fraud class action under Section 10(b) alleging that a software company and certain of its executives misled investors by touting a new data-backup product that they knew did not work. *Constr. Indus. & Laborers Joint Pension Tr. v. Carbonite*, 22 F.4th 1 (1st Cir. 2021) (Kayatta, J.). On the issue of scienter, the court held that the complaint alleged facts raising a strong inference that the CEO and CFO either inquired about the new product before deciding to promote it to investors or were reckless in failing to do so.

Following its launch, plaintiff alleged that the new product did not work and that the company set up a team focused on fixing the product, while at the same time company executives publicly stated that the new product "significantly improves our performance" and is "just a super strong product," among other statements.

The First Circuit disagreed with the district court that plaintiff failed to successfully plead scienter. Specifically, plaintiff asserted that defendants must have known that the product did not work because its professed importance to the company strongly implied that senior officers were following it closely and were aware of its failings. Plaintiff alternatively asserted that defendants were at least highly reckless in promoting the product because, if they were not aware of the issues, "then they repeatedly and with apparent premeditation promoted it as important to the company without at least checking that it had ever worked."

The court also rejected the argument that the company's efforts to remedy the issues with the product suggested "a sincere belief that [the product] could be made operational with enough work, such that [the company] believed [the product] was fixable." The court pointed out that the executives' statements were framed in the present tense and, therefore, "were not projections of hoped-for future performance." The court characterized the statements as "flat-out claims about the product as it then stood."

Second Circuit: No Duty to Disclose Payment for Promotional Articles Where Payor Did Not Have Ultimate Control Over the Articles

On May 24, 2022, the Second Circuit affirmed in part the dismissal of a putative securities fraud class action alleging that a company, its former CEO, and former CFO violated Section 10(b) of the Exchange Act and SEC Rule 10b-5 by failing to disclose that they paid authors to write positive online articles to promote the company's stock. *Noto v. 22nd Century Grp.*, 35 F.4th 95 (2d Cir. 2022) (Walker, J.). The court held that plaintiffs failed to state a claim that the existence of the stock promotion scheme constituted a materially misleading omission because the complaint did not adequately allege that defendants had a duty to disclose that they paid for the articles' publication.

The Second Circuit explained that "only an article's maker, not its benefactor, has a duty to disclose that it was paid for." *Janus Capital Group v. First Derivative Traders*,

564 U.S. 135 (2011). The court stated that *Janus* made it clear that neither the company nor the executives qualified as a maker.[1] The Second Circuit determined that plaintiffs did not adequately allege that defendants had "ultimate control" over the articles as required by *Janus*. The court found that the complaint did not contain sufficient factual allegations to support the contention that "defendants furnished information and language for, prepared, reviewed, approved, and/or ratified the articles . . . ." The Second Circuit also pointed out that even if the CEO did provide some input on the articles' content, the complaint did not support the conclusion that he was the articles' maker. Among other things, the court found that the complaint did not sufficiently allege that the authors lacked final control over the content of the articles.

Second Circuit: Acquirer Shareholders Lacked Standing to Sue a Merger Target Under Section 10(b) Because They Never Bought or Sold the Target's Shares

On September 30, 2022, the Second Circuit affirmed a district court's dismissal of a putative securities fraud class action brought by shareholders of a U.S. company that acquired a non-U.S. target company, alleging that the target made misstatements about itself in advance of the merger in violation of Section 10(b). *Menora Mivtachim Ins. v. Frutarom Indus.*, 49 F.4th 790 (2d Cir. 2022) (Park, J.). Creating a bright-line rule, the Second Circuit held that plaintiffs lacked standing under Section 10(b) to sue the target because plaintiffs had bought shares of the acquirer, not shares of the target.

Following the acquisition, the acquirer experienced a stock drop after it acknowledged that the target had made "improper payments." Plaintiffs sued the acquirer, two of its officers, the target, and five of its officers alleging that in the lead up to the acquisition the target made materially misleading statements about the sources of its business growth and its compliance with anti-bribery laws. The Southern District of New York dismissed, concluding, in part, that "plaintiffs lack statutory standing under Section 10(b) to bring claims against the [target] defendants for statements made about [the target]." Plaintiffs appealed the decision only against the target and certain of its officers.

Plaintiffs argued on appeal that as acquirer shareholders, they had standing because there was a "sufficiently direct relationship" between the target's misstatements about itself and the price of the acquirer's shares. However, the Second Circuit rejected this argument as meritless, explaining that judicially created private rights of action should be narrowly construed. The Second Circuit refused to adopt plaintiffs' "direct relationship" test stating that doing so would erode the purchaser-seller rule established in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975), which "requires plaintiffs to have bought or sold a security of the issuer about which a misstatement was made in order to have standing to sue under Section 10(b)."

Fourth Circuit: Affirms Dismissal of Class Action Alleging That Data Protection and Privacy Statements Were False or Misleading

On April 21, 2022, the Fourth Circuit affirmed a district court's dismissal of a putative securities fraud class action against a hotel chain company and certain of its officers and directors alleging that the company's failure to disclose vulnerabilities in certain IT systems it acquired in a merger rendered various of its public statements false or misleading in violation of Section 10(b).

1. In *Janus*, the Supreme Court held that a mutual fund investment advisor could not be liable for misstatements included in its client mutual funds' prospectuses because "the maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it." The mutual funds in *Janus* were determined to be the makers of the statements in the prospectuses because they filed the prospectuses with the SEC and had ultimate control over their content, while the investment advisor was not a "maker," even if he was involved in the preparation of the prospectuses.

In re Marriott Int'l, 31 F.4th 898 (4th Cir. 2022) (Heytens, J.). The court held that plaintiff failed to adequately allege that any of the company's statements were false or misleading.

In 2018, the company learned of a data breach related to a guest reservation database that it had subsumed following a 2016 merger with another hotel chain. Subsequently, plaintiff sued alleging that the company's failure to disclose severe vulnerabilities in the subsumed IT systems rendered various public statements false or misleading. The district court dismissed with prejudice, concluding that plaintiff did not adequately allege a false or misleading statement or omission. Plaintiff appealed, narrowing its challenge to 18 statements.

On appeal, the Fourth Circuit explained that "an omission is actionable only if—absent the fact omitted—a reasonable investor, exercising due care, would gather a false impression from a statement, which would influence an investment decision." *Phillips v. LCI Int'l*, 190 F.3d 609 (4th Cir. 1999). Plaintiff challenged the company's public statements that "the integrity and protection of customer, employee, and company data is critical to us . . . ." Plaintiff claimed that by failing to disclose the "vulnerable state" of the subsumed IT systems, the company's statements created a misleading impression that the company was securing and protecting the acquired customer data. The Fourth Circuit disagreed, finding that the facts alleged did not contradict the public disclosures. The court noted that the plaintiff's "whole theory of the case turns on the [disclosures] being true—*i.e.*, that data integrity is critically important to [the company] and its investors." The court explained that "[r]eiterating this basic truth is neither misleading nor creates the false impression [plaintiff] suggests."

Sixth Circuit: Alleging That Index Funds Outperformed Managed Funds Fails to State a Breach of the Duty of Prudence Claim

On June 21, 2022, the Sixth Circuit affirmed a district court's dismissal of a putative class action brought by a participant in a defined contribution 401(k) plan alleging that her 401(k) plan administrator and her former employer had breached the duty of prudence under ERISA[2] by offering several actively managed investment funds when available index funds offered higher returns and lower fees. *Smith v. CommonSpirit Health*, 37 F.4th 1160 (6th Cir. 2022) (Sutton, J.). Plaintiff pointed to three-year and five-year periods in which three actively managed funds trailed the rates of return for related index funds. The Sixth Circuit held that plaintiff failed to plead that defendants acted imprudently in offering the managed funds by alleging only that the managed funds' performance trailed the index funds' performance over a period of five years.

The Sixth Circuit considered *Tibble v. Edison Int'l*, 575 U.S. 523 (2015), which held that a fiduciary's duty of prudence creates "a continuing duty to monitor trust investments and remove imprudent ones." The Sixth Circuit held that plaintiff failed to plausibly plead that the company violated ERISA by imprudently offering these specific actively managed funds. After noting that index funds offer a mix of investment types and low management fees, the court stated that these features did not "make all other fund types imprudent." The court pointed out that while an actively managed fund may cost more than an index fund, it may generate greater returns in the long term. The court stated that "these claims require evidence that an investment was imprudent from the moment the administrator selected it, that the investment became imprudent over time, or that the investment was otherwise clearly unsuitable for the goals of the fund based on ongoing performance." The court concluded that merely pointing to another investment that has performed better over a five-year period does not plausibly plead an imprudent decision.

2. 29 U.S.C. § 1104(a)(1)(B).

Seventh Circuit: Reverses Bylaw-Based Dismissal of a Derivative Suit Under Section 14(a) of the Exchange Act

On January 7, 2022, a split Seventh Circuit panel reversed a derivative suit's dismissal based on a company forum-selection bylaw requiring derivative actions be filed in the Delaware Court of Chancery. *Seafarers Pension Plan v. Bradway*, 23 F.4th 714 (7th Cir. 2022) (Hamilton, J.). The court held that the "forum bylaw cannot be applied to this derivative action asserting a claim that is subject to exclusive federal jurisdiction." The court explained that if the bylaw were so applied then plaintiff's derivative action could not be heard in any forum because the Exchange Act gives federal courts exclusive jurisdiction over actions under it. Further, the court stated that this "result would be contrary to Delaware corporation law, which respects the non-waiver provision in Section 29(a) of the federal Exchange Act, 15 U.S.C. § 78cc(a)."

Following two fatal plane crashes involving the same aircraft model, plaintiff filed this derivative suit under Section 14(a) of the Exchange Act in the Northern District of Illinois where the manufacturer of the planes is headquartered. Plaintiff alleged that the company's officers and directors made materially false and misleading statements about the aircraft model in the company's proxy materials. The district court dismissed on forum non conveniens grounds after applying a company bylaw[3] requiring that any derivative actions be filed in the Delaware Court of Chancery.

On appeal, the Seventh Circuit stated that the "most straightforward resolution of this appeal is under Delaware corporation law, which we read as barring application of the [company's] forum bylaw to this case invoking non-waivable rights under the federal Exchange Act." The court concluded that Section 115[4] of the Delaware General Corporation Law, "does not authorize use of a forum-selection bylaw to avoid what should be exclusive federal jurisdiction over a case, particularly under the Exchange Act." The court concluded that as applied here, the company's forum bylaw violates Section 115 because it is inconsistent with the jurisdictional requirements of the Exchange Act.

Eighth Circuit: Affirms Dismissal of Derivative Action After Applying the Delaware Supreme Court's Recently Revised Demand Futility Test

On April 7, 2022, the Eighth Circuit affirmed a district court's dismissal, for failure to plead demand futility, of a derivative action alleging that a pre-merger proxy statement contained false and misleading statements in violation of Section 14(a) of the Exchange Act. *Carpenters' Pension Fund of Illinois v. Neidorff*, 30 F.4th 777 (8th Cir. 2022) (Shepherd, J.). The Eighth Circuit held that plaintiffs failed to plead a material misrepresentation or omission and therefore failed to plead facts demonstrating that at least half of the board faced a substantial likelihood of liability on the Section 14(a) claim.

Shortly after merging with a target company, the corporation disclosed an increase in reserves for the target's increased liabilities. A stock drop followed. Among other derivative claims, plaintiffs alleged that certain of the corporation's former and then-current directors and officers concealed their knowledge of the target's various financial and business problems. Defendants moved to dismiss on the ground that plaintiffs failed to plead demand futility. The district court

3. The bylaw provided in relevant part, "With respect to any action arising out of any act or omission occurring after the adoption of this By-Law, unless the Corporation consents in writing to the selection of an alternative forum, the Court of Chancery of the State of Delaware shall be the sole and exclusive forum for . . . any derivative action or proceeding brought on behalf of the Corporation . . . ."

4. Section 115 provides that "bylaws may require, consistent with applicable jurisdictional requirements, that any or all internal corporate claims shall be brought solely and exclusively in any or all of the courts in this State." 8 Del. C. § 115.

granted defendants' motion and dismissed the case with prejudice.

As the nominal defendant was a Delaware corporation, the Eighth Circuit applied the three-part demand futility test articulated last year by the Delaware Supreme Court in *UFCW Union & Participating Food Indus. Emps. Tri-State Pension Fund v. Zuckerberg*, 262 A.3d 1034 (Del. 2021) (*Tri-State*). The court focused exclusively on the second *Tri-State* question, *i.e.*, whether at least half of the board (here, five of the nine directors) faced a substantial likelihood of liability as to any of plaintiffs' claims. The court concluded that plaintiffs failed to plead particularized facts demonstrating that at least half of the directors faced a substantial likelihood of liability on the Section 14(a) claim because plaintiffs failed to plead facts showing that the proxy statement at issue contained a material misrepresentation or omission. The court found that this cautionary language in the proxy statement related directly to the allegedly misleading pro forma analyses and therefore rendered the alleged omissions immaterial as a matter of law.

Ninth Circuit: Forum-Selection Clause Does Not Contravene Strong Public Policy Even Where It Forecloses Plaintiff's Ability to Bring Section 14(a) Claims

On May 13, 2022, the Ninth Circuit affirmed the dismissal of a shareholder derivative action, which plaintiff had filed in a California federal district court despite a forum-selection clause in the company's bylaws designating the Delaware Court of Chancery as the exclusive forum for derivative claims. [*Lee v. Fisher*, 34 F.4th 777 (9th Cir. 2022) (Smith, J.)]. The court held that plaintiff had not shown that the forum-selection clause was unenforceable, as enforcement would not contravene strong federal public policy. Notably, the Ninth Circuit's decision was vacated on October 24, 2022 in *Lee v. Fisher*, 2022 WL 13874339 (9th Cir. 2022), and rehearing en banc was granted.

In its May 13, 2022 decision, the Ninth Circuit explained that in *Atlantic Marine Construction v. U.S. District Court*, 571 U.S. 49 (2013), the Supreme Court established the rule that "a district court should transfer the case [and thereby enforce the forum-selection clause] unless extraordinary circumstances . . . clearly disfavor a transfer." To define "extraordinary circumstances," the Ninth Circuit looked to *M/S Bremen v. Zapata Off-Shore*, 407 U.S. 1 (1972) and focused on its second factor: whether the clause's enforcement would contravene strong public policy. To determine whether a forum-selection clause contravenes public policy, the Ninth Circuit first looks to "the forum in which suit is brought" and then "determine[s] whether the plaintiff has identified a statute or judicial decision in that forum that clearly states strong public policy rendering the clause unenforceable."

Weighing whether the Exchange Act's antiwaiver provision in Section 78cc(a) was proof of strong public policy, the court stated that "the strong federal policy in favor of enforcing forum-selection clauses supersedes antiwaiver provisions in state statutes as well as federal statutes . . . ." The court further pointed out that the Exchange Act's antiwaiver provision does not contain a clear declaration of federal policy because it does not explicitly state that any waiver is void as against public policy.

Ninth Circuit: Market Growth and Sales Performance Statements Determined to Be Non-Actionable Puffery

On July 7, 2022, the Ninth Circuit affirmed a district court's dismissal of a securities fraud class action against a medical product manufacturer and certain of its executives alleging that senior executives misrepresented the company's sales growth in China. [*Macomb Cnty. Emps. Ret. Sys. v. Align Tech.*, 39 F.4th 1092 (9th Cir. 2022) (McKeown, J.)]. The court agreed with the district court that six of the challenged statements were puffery.

In 2019, the company's revenue growth rate in China decreased and a stock drop occurred. Subsequently, the plaintiff pension plan filed a class action under Section 10(b) and Rule 10b-5, alleging that company executives had misrepresented the company's growth in China throughout Q2 of 2019, "claiming strong numbers despite knowing (or recklessly disregarding) that the growth rate in China had slowed significantly." The district court dismissed the action with prejudice, holding that the challenged statements, which described the market for the company's products in China and the company's performance there, were either non-actionable puffery or were not false or misleading. Plaintiff appealed.

On appeal, the Ninth Circuit held that the district court correctly found that six of the challenged statements were non-actionable puffery. Under Ninth Circuit precedent, puffery involves "expressing an opinion that is not capable of objective verification." *Retail Wholesale & Dep't Store Union Local 338 Ret. Fund v. Hewlett-Packard*, 845 F.3d 1268 (9th Cir. 2017). Such statements are not actionable because professional investors, and most amateur investors, "know how to devalue the optimism of corporate executives." *Police Ret. Sys. of St. Louis v. Intuitive Surgical*, 759 F.3d 1051 (9th Cir. 2014). The Ninth Circuit explained that six of the challenged statements used vague, generically positive terms, such as describing China as "a market that's growing significantly for us," and describing the company's performance in China as "tremendous" and "great." The court determined that such characterizations were not "objectively verifiable" and did not present the kind of "precise information" on which investors rely.

Eleventh Circuit: Solicitation of Unregistered Securities Under Section 12 Can Occur Through Online Videos, Including on Social Media

On February 18, 2022, the Eleventh Circuit reversed the district court's dismissal of a class action alleging that the promoters of a new cryptocurrency violated Section 12 of the Securities Act by soliciting the purchase of unregistered securities through online videos. [*Wildes v. BitConnect*, 25 F.4th 1341 (11th Cir. 2022) (Grant, J.)]. The court held that neither the Securities Act nor Eleventh Circuit precedent restrict liability to sales pitches to individual people, while excluding liability for communications directed to the public at large. Noting that solicitation has long occurred through other mass communications, the court determined that solicitation under Section 12 can occur through online videos.

This case arose when promoters of a new cryptocurrency urged people to buy it by posting thousands of videos on independent websites and on social media. Subsequently, buyers of the cryptocurrency sued alleging that the promoters were liable under Section 12 of the Securities Act for soliciting the purchase of unregistered securities through their videos. The district court dismissed, concluding that plaintiffs failed to state a Section 12 claim because they needed to allege that the promoters had "individually" urged plaintiffs to purchase the cryptocurrency.

The Eleventh Circuit observed that "nothing in the Securities Act makes a distinction between individually targeted sales efforts and broadly disseminated pitches." The court explained that Section 12 authorizes buyers of an unregistered security to sue a person who "offers or sells" it. Under the Securities Act, "a person offers a security every time he makes an offer to dispose of—or a solicitation of an offer to buy—a security for value." The court noted that Congress did not limit solicitations to individualized ones as the district court did. Pointing out that the Securities Act suggests the opposite, the court explained that the Securities Act "makes a person who solicits the purchase of an unregistered security liable for using 'any means' of communication[,]" which the Securities Act defines to include radio and television advertisements. The

court further stated that "Securities Act precedents do not restrict solicitations under the Act to targeted ones." The Eleventh Circuit declined to adopt an approach that would allow a seller to dodge liability by selecting one means of communication over another, particularly where the Act expressly covers "any means" of communication. Determining that a "new means of solicitation is not any less of a solicitation[,]" the court concluded that when the promoters urged people to buy the cryptocurrency in online videos, they solicited the purchases that followed.

Eleventh Circuit: SLUSA Held to Bar Class Action for Breach of Fiduciary Duty Claims Brought Under State Law

On May 31, 2022, the Eleventh Circuit affirmed the dismissal of a putative class action against a brokerage firm/investment adviser alleging that under Georgia law the brokerage firm breached its fiduciary duties by recommending certain investments to clients. *Cochran v. Penn Mut. Life Ins.*, 35 F.4th 1310 (11th Cir. 2022) (Carnes, J.). The court held that the Securities Litigation Uniform Standards Act ("SLUSA") barred plaintiff from using a class action to bring his state law claims because the claims involved allegations of misrepresentation or omission that should have been brought under the federal securities laws. Referencing 15 U.S.C. Section 77p(b), the court concluded that the class action had been properly dismissed because the complaint alleged "an untrue statement or omission of material fact in connection with the purchase or sale of a covered security."

Plaintiff alleged that the brokerage firm breached its fiduciary duties by recommending variable annuities to clients with IRAs, which caused them to pay high fees without getting an extra tax benefit because the IRAs were already tax advantaged. The district court dismissed, agreeing with the brokerage firm that federal law barred the class action.

On appeal, the Eleventh Circuit explained that SLUSA limits class actions by stating that, "[n]o covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging—(1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or (2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security." 15 U.S.C. § 77p(b). Citing *Behlen v. Merrill Lynch*, 311 F.3d 1087 (11th Cir. 2002), the court further explained that "SLUSA's bar applies when (1) the suit is a covered class action, (2) the plaintiffs' claims are based on state law, (3) one or more covered securities has been purchased or sold, and (4) the defendant allegedly misrepresented or omitted a material fact in connection with the purchase or sale of such security."

The Eleventh Circuit stated that the only issue was whether the complaint alleged a misrepresentation or omission, stating that if it does so, then it is barred. The court explained that under *Behlen*, "[t]o determine whether a complaint alleges a misrepresentation or omission, we look to its gravamen or the essence of it." The court determined that the essence of the complaint was that the brokerage firm, through its investment advice and recommendations, "affirmatively made false statements, or failed to disclose material facts, about the suitability of the variable annuity investment for the type of account plaintiff had, and in that way made misrepresentations to the plaintiff." The court observed that if the brokerage firm's recommendations had fully disclosed all material facts, including that a variable annuity would not have tax benefits and would be an unsuitable investment, that plaintiff would have no cause of action.

Significant Delaware Chancery Court Decisions

Court of Chancery of Delaware: Applies Entire Fairness Standard to De-SPAC Merger

On January 3, 2022, the Court of Chancery of Delaware largely denied motions to dismiss in a class action for breach of fiduciary duties alleging that certain SPAC directors, officers, the SPAC's sponsor, and the SPAC CEO/Chair who also ultimately controlled the SPAC sponsor (the "Controlling Stockholder"), withheld material information from the public stockholders, which allegedly impaired their informed exercise of their redemption and voting rights before the de-SPAC merger. *In re MultiPlan S'holders Litig.*, 268 A.3d 784 (Del. Ch. Ct. 2022) (Will, V.C.).[5] Among other things, the court held that the entire fairness standard of review applied at the pleading stage.

The court determined that plaintiffs pleaded facts supporting a reasonable inference that the entire fairness standard of review—Delaware's "most onerous standard of review"—applied rather than the more deferential business judgment rule. The court concluded that entire fairness applied on two independent bases because plaintiff alleged that: (i) the de-SPAC merger was a conflicted controller transaction; and (ii) a majority of the SPAC board was conflicted either because the directors were self-interested or because they lacked independence from the Controlling Stockholder.

The court explained that plaintiffs must adequately plead that the Controlling Stockholder engaged in a conflicted transaction, where either "the controller stands on both sides" (which did not apply because the court found that this was an arms-length transaction between two unaffiliated parties) or "the controller competes with the common stockholders for consideration." The court explained that, among other things, a controller competes with the common stockholders when he "receives a unique benefit by extracting something uniquely valuable to the controller, even if the controller nominally receives the same consideration as all other stockholders to the detriment of the minority." *IRA Tr. FBO Bobbie Ahmed v. Crane*, 2017 WL 7053964 (Del. Ch. 2017, revised 2018). The court determined that plaintiffs pleaded facts supporting a reasonable inference that there was a unique benefit to the Controlling Stockholder. The court pointed out that the merger had a value to the common stockholders if shares of the post-merger entity were worth $10.04, while the merger was valuable to the Controlling Stockholder "well below" $10.04 because the value of the Controlling Stockholder's founder shares would drop to zero if no de-SPAC merger occurred.

5. Simpson Thacher represents defendant MultiPlan Corp. f/k/a Churchill Capital Corp. III in this action.

This edition of the
Securities Law Alert was edited by
Peter E. Kazanoff / +1-212-455-3525
pkazanoff@stblaw.com
Joshua Polster / +1-212-455-2266
joshua.polster@stblaw.com and
Karen Porter / +1-202-636-5539
karen.porter@stblaw.com

Simpson
Thacher

New York

Martin S. Bell
Partner
+1-212-455-2542
martin.bell@stblaw.com

Marc P. Berger
Partner
+1-212-455-2197
marc.berger@stblaw.com

Stephen M. Cutler
Partner
+1-212-455-2773
stephen.cutler@stblaw.com

Michael J. Garvey
Partner
+1-212-455-7358
mgarvey@stblaw.com

Nicholas S. Goldin
Partner
+1-212-455-3685
ngoldin@stblaw.com

Meredith Karp
*Partner**
+1-212-455-3074
meredith.karp@stblaw.com

Peter E. Kazanoff
Partner
+1-212-455-3525
pkazanoff@stblaw.com

Joshua A. Levine
Partner
+1-212-455-7694
jlevine@stblaw.com

Linton Mann III
Partner
+1-212-455-2654
lmann@stblaw.com

Joseph M. McLaughlin
Partner
+1-212-455-3242
jmclaughlin@stblaw.com

Lynn K. Neuner
Partner
+1-212-455-2696
lneuner@stblaw.com

Michael J. Osnato, Jr.
Partner
+1-212-455-3252
michael.osnato@stblaw.com

Joshua Polster
Partner
+1-212-455-2266
joshua.polster@stblaw.com

Rachel Sparks Bradley
*Partner**
+1-212-455-2421
rachel.sparksbradley@stblaw.com

Alan C. Turner
Partner
+1-212-455-2472
aturner@stblaw.com

Craig S. Waldman
Partner
+1-212-455-2881
cwaldman@stblaw.com

George S. Wang
Partner
+1-212-455-2228
gwang@stblaw.com

Alicia N. Washington
*Partner**
+1-212-455-6074
alicia.washington@stblaw.com

Jonathan K. Youngwood
Partner
+1-212-455-3539
jyoungwood@stblaw.com

David Elbaum
Senior Counsel
+1-212-455-2861
david.elbaum@stblaw.com

Janet A. Gochman
Senior Counsel
+1-212-455-2815
jgochman@stblaw.com

Los Angeles

Chet A. Kronenberg
Partner
+1-310-407-7557
ckronenberg@stblaw.com

Palo Alto

Stephen P. Blake
Partner
+1-650-251-5153
sblake@stblaw.com

Bo Bryan Jin
*Partner**
+1-650-251-5068
bryan.jin@stblaw.com

James G. Kreissman
Partner
+1-650-251-5080
jkreissman@stblaw.com

Simona G. Strauss
Senior Counsel
+1-650-251-5203
sstrauss@stblaw.com

Washington, D.C.

Meaghan A. Kelly
Partner
+1-202-636-5542
mkelly@stblaw.com

Jeffrey H. Knox
Partner
+1-202-636-5532
jeffrey.knox@stblaw.com

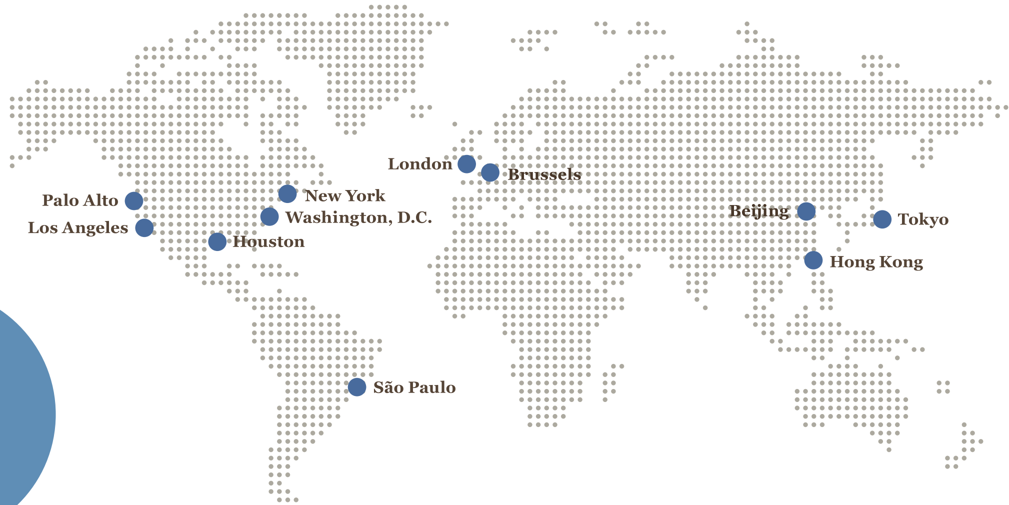
Karen Porter
Partner
+1-202-636-5539
karen.porter@stblaw.com

Cheryl J. Scarboro
Partner
+1-202-636-5529
cscarboro@stblaw.com

*Effective January 1, 2023

The contents of this publication are for informational purposes only. Neither this publication nor the lawyers who authored it are rendering legal or other professional advice or opinions on specific facts or matters, nor does the distribution of this publication to any person constitute the establishment of an attorney-client relationship. Simpson Thacher & Bartlett LLP assumes no liability in connection with the use of this publication. Please contact your relationship partner if we can be of assistance regarding these important developments. The names and office locations of all of our partners, as well as our recent memoranda, can be obtained from our website, www.simpsonthacher.com.

Simpson
Thacher



UNITED STATES

New York
425 Lexington Avenue
New York, NY 10017
+1-212-455-2000

Houston
600 Travis Street, Suite 5400
Houston, TX 77002
+1-713-821-5650

Los Angeles
1999 Avenue of the Stars
Los Angeles, CA 90067
+1-310-407-7500

Palo Alto
2475 Hanover Street
Palo Alto, CA 94304
+1-650-251-5000

Washington, D.C.
900 G Street, NW
Washington, D.C. 20001
+1-202-636-5500

EUROPE

Brussels
Square de Meeus 1, Floor 7
B-1000 Brussels
Belgium
+32-472-99-42-26

London
CityPoint
One Ropemaker Street
London EC2Y 9HU
England
+44-(0)20-7275-6500

ASIA

Beijing
3901 China World Tower A
1 Jian Guo Men Wai Avenue
Beijing 100004
China
+86-10-5965-2999

Hong Kong
ICBC Tower
3 Garden Road, Central
Hong Kong
+852-2514-7600

Tokyo
Ark Hills Sengokuyama Mori Tower
9-10, Roppongi 1-Chome
Minato-Ku, Tokyo 106-0032
Japan
+81-3-5562-6200

SOUTH AMERICA

São Paulo
Av. Presidente Juscelino
Kubitschek, 1455
São Paulo, SP 04543-011
Brazil
+55-11-3546-1000